

JON COLSTON

v.

DEPARTMENT OF THE ARMY

DOCKET No.

CH07528090151

OPINION AND ORDER

Appellant, an Administrative Supply Technician with the Department of the Army, HQ 169th Support Group, Huisman Training Center, Cleveland, Ohio, was removed from his position for receiving unearned or unauthorized pay for reserve drills by making false or unsupported entries on agency forms for the drills in question and for failing to reactivate the electronic intrusion detection alarm system for the weapon's vault, resulting in the vault being unsecured for five days, in violation of Army Regulation 190-11. The presiding official found that the agency had failed to support the two charges by a preponderance of the evidence, and, therefore, reversed the removal.

The agency, in its petition for review, challenges the presiding official's decision on the second charge of a violation of agency regulation, AR 190-11. In his initial decision, the presiding official stated that the agency failed to produce this regulation so that a *determination could be made as to whether appellant had violated it*. The agency, in requesting a review of this decision, avers that the presiding official, in an off-the-record side bar conference at the hearing advised both counsels after each had offered a copy of the said regulation, that submission of the regulation would not be necessary.

The Board, after considering the petition, decided that the taking of further evidence on the alleged proffer of the regulation would be necessary in order to adjudicate the case. Therefore, the Board ordered the presiding official, the agency's counsel, and appellant's counsel to submit affidavits on the proffer made by counsel, the discussion between the counsel and the presiding official, and the ruling of the presiding official in the alleged off-the-record side bar conference regarding the admission of the regulation.

Appellant's counsel avers that he has no recall of a proffer of the agency's regulation or of any discussion or ruling on same. The agency's counsel attests to the facts as stated in its petition for review except that he now only states that the presiding official indicated submission would not be necessary, but says nothing about a ruling. The presiding official states that he held no off-the-record conversation with the parties wherein he advised either counsel that submission of the regulation would not be necessary. Considering the

affidavits in light of the interests to be served and in conjunction with our own review of the hearing transcript, we find that while the affidavits do not clearly establish what occurred in the alleged "off-the-record" side bar conference, the presiding official's attestation as to the proffer appears more consistent with the testimony given at the hearing than the agency's description.

However, a review of the record shows that a copy of a part of the regulation was submitted by appellant's counsel with his closing brief. This regulation only states that there will be a two-man security system for the weapons vault and that the commander will establish internal lock and key control procedures to preclude defeat of the two-man system. The agency did not present any evidence as to these internal procedures, and the second charge is actually based on a violation of these procedures rather than the more general regulation. Therefore, the agency did fail to meet its burden of proof on this charge, regardless of the submission of the regulation before the record was closed, because the regulation *per se* does not explain the internal procedures for security.

Accordingly, the petition for review is DENIED.

As required by the initial decision, the agency is hereby ORDERED to cancel the removal. Proof of compliance with this Order shall be submitted by the agency to the Office of the Secretary of the Board within 20 days of the date of issuance of this opinion. Any petition for enforcement of this Order shall be made to the Chicago Regional Office in accordance with 5 C.F.R. § 1201.181(a).

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. § 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

WASHINGTON, D.C., *February 9, 1982*